No. 87-431

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

OTIS R. BOWEN, Secretary of Health and Human Services,

Appellant,

v.

CHAN KENDRICK, *et al.*,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

BRIEF OF THE INSTITUTE FOR YOUTH ADVOCACY, *AMICUS CURIAE*, IN SUPPORT OF APPELLANT

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Question Presented

Does it violate the First Amendment for the federal government to respond to the graphic harms of adolescent sexual activity and pregnancy by seeking innovative help, such as education and counselling for high-risk teenagers, from a broad spectrum of private charitable organizations, including some with religious affiliation?

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BRIEF *AMICUS CURIAE*

The Institute for Youth Advocacy, Covenant House, respectfully submits this brief *amicus curiae* in support of Appellant in this case. The written consents of the parties have been obtained and submitted to the Clerk.

Statement of Interest

The Institute for Youth Advocacy is a part of Covenant House, the largest private organization in the country serving homeless and runaway children. Founded officially in 1972 by Fr. Bruce Ritter, a Franciscan priest, Covenant House annually provides crisis and long-term help to over 15,000 children and teenagers in New York City, Houston, Toronto, Fort Lauderdale, New Orleans, Guatemala, Panama, and Honduras. Separated at least temporarily,

but often permanently, from their families, these children and adolescents are forced into a desperate struggle for survival on the street, pushed into petty crime, prostitution, panhandling, and despair. The crisis shelters of the agency operate on an "open-intake" basis: no child or teenager is ever turned away on the first visit, and only serious misconduct or refusal to make use of proffered services limits repeat visits.

Nearly all the adolescents served by Covenant House in its American programs are sexually active. Many of the girls arrive at "intake" pregnant or with a child in tow: in New York alone over 800 teenage mothers entered crisis shelter in 1987, bringing with them some 1000 infants and toddlers. Special mother-child units in the crisis shelters, and now a special longer-term program called Rights of Passage, attempt to meet the needs of these young women and their children for health care, legal assistance, counselling, and training in parenting and "survival skills". Yet there are few solid options for them: by virtue of their age and immaturity most young mothers, and young fathers, at Covenant House require months or even years of help before they reach self-sufficiency, and their children often spend extensive periods in foster care.

In October of 1984 Covenant House was awarded a grant from the U.S. Department of Health and Human Services under the Adolescent Family Life Act, 42 U.S.C. (& Supp. III) § 300z *et seq.* (the "Act"), to develop innovative programs to assist teenage mothers and fathers in its New York, Houston and Fort Lauderdale programs. *See* Jt. App. 639-641 (Affidavit of Rev. Ritter). The grants averaged approximately $375,000 for each of the first two years, then have declined each year as scheduled, and will end after five years. Some 36 staff members, including health and social-work professionals, have served to date

over 300 adolescents in the Covenant House programs sponsored under the Act. These funded programs have been independently assessed each year by an outside, university-affiliated evaluator, and have demonstrated substantial success in reducing pregnancy rates among the population served, while providing useful training in many areas beyond sexuality and parenting, including health, nutrition, and job-finding. No religious proselytizing is permitted in any of these programs, and they are provided in a religiously neutral setting.

Covenant House as an organization, however, has ties to the Roman Catholic Church, both in having as its president and founder a Catholic priest, and its listing as a "Catholic charity" in *The Official Catholic Directory.* The agency has, however, its own tax exemption under Section 501(c)(3) of the Internal Revenue Code, and is governed by a non-sectarian board of directors, with no right of interference held by any religious authority. Its support comes from individual contributions from the general public (80%), corporations and foundations (10%-15%), and government sources (5%-10%).

This case affects Covenant House in a number of direct and substantial ways. If the decision appealed from is affirmed, it is possible that Covenant House will be deemed ineligible to participate in any activities under the Act, and will lose funding for the programs currently in operation. Continuation of those programs without federal support would be highly problematic, and the young mothers and fathers they serve would lose their benefits under the Act. Finally, Covenant House may be unfairly stigmatized as a "religious organization" and forced to a heavy burden of proof in applying for government assistance in other parts of its programs for vulnerable children.

Covenant House brings to the case not only a strong interest in its outcome, but a perspective somewhat different from that of any of its current parties. As a provider of services under the Act, Covenant House has experience in its administration and its philosophy. More crucially, as a longtime national leader in innovative services for homeless and runaway teenagers, Covenant House has faced the crucible of adolescent sexuality and pregnancy every hour of its existence. Because that crucible is so real and so tragic for hundreds of thousands of children and adolescents, Covenant House submits this brief *amicus curiae* in support of Appellant and in support of the validity of the challenged Act.

Statement of the Case

Amicus accepts and adopts the Statement of the Case in the Jurisdictional Statement of the Appellant Secretary of Health and Human Services. U.S. J.S. 2-8.

Summary of the Argument

Premature involvement of adolescents in sexual activity and pregnancy is a national problem of alarming dimensions and with devastating results for many teenagers. Adoption of the Adolescent Family Life Act, 42 U.S.C. (& Supp. III) § 300z *et seq.* (the "Act"), to fund innovative approaches toward reducing premarital intercourse and pregnancy was an important and appropriate response in view of the public costs, and private suffering, such sexual activity inflicts. Inclusion of "religious organizations" as among the broad range of private groups and organizations eligible to participate in the Act's programs was necessary to make them fully effective and comprehensive.

Such inclusion does not conflict with the Establishment Clause of the First Amendment. Only grave secular interests are furthered in the Act's structure and philosophy; "religion" and "religious doctrine", properly understood, are in no way advanced or hindered by the Act, even if its programs are carried out by religio ly affiliated organizations. The Act also threatens no "entanglement" of government and religion, for it is structured along lines similar to longstanding, clearly valid partnerships of government with private organizations (including religious organizations) to aid vulnerable children, with special protections against the need for excessive government "monitoring" of programs. The compelling interests of children and teenagers in this area, moreover, counsel a careful weighing of the interests at stake; the balance will clearly fall on the side of the Act's validity.

If the Act is found partially unconstitutional, however, the vague, overbroad description of "religious organizations" in the District Court opinion should be modified to allow participation in the Act's programs by religiously affiliated organizations that are not "pervasively religious" in character. The lower court's unwillingness to consider the nuances of religious affiliation is symptomatic of its generally mechanical approach to the delicate human and constitutional interests at stake in this important case. The scarred and sometimes broken children whom the Act seeks to help merit a more insightful reading of the First Amendment.

Introduction

> The first time, it was like totally out of the blue. You don't . . . say, "Well, I'm going to his house, and he's probably going to get to bed with me, so I better make sure I'm prepared." I mean, you don't know it's coming, so how are you to be prepared?
>
> New York [girl] aged 16-17[1]

Every year, "totally out of the blue", some 270,000 unmarried girls under the age of 20 give birth to a child.[2] Half again that many teenaged girls—401,000 in 1984—undergo abortions, while another 130,000 have miscarriages.[3] As little "prepared" as they are for first sexual intercourse, they are even less ready to cope with its consequences. Addressing the plight of these girls, and the plight of the children they bear, is at the very least "high on the social agenda";[4] more likely it represents one of the central public policy challenges of this half century.

The Adolescent Family Life Act (the "Act"), 42 U.S.C. (& Supp. III) §§ 300z-300z-10, is the most recent, and most remarkable response by Congress to that challenge. For Congress sought explicitly in the Act to encourage "innovative programs that have as their goal the overall reduction in the high rate of premarital adolescent [sexual] relations."[5] While certainly an obvious strategy to reduce

[1] E. Kisker, *Teenagers Talk About Sex, Pregnancy and Contraception*, 17 Family Planning Perspectives 83 (1985).

[2] Nat'l Research Council, I *Risking the Future: Adolescent Sexuality, Pregnancy, and Childbearing* 65 (1987) (hereinafter "Risking the Future").

[3] *Id.* at 54.

[4] E. Jones *et al.*, *Teenage Pregnancy in Industrialized Countries* 240 (1986).

[5] S. Rep. No. 496, 98th Cong., 2d Sess. 5 (1984).

adolescent pregnancy rates, it was also one that had gone almost completely neglected by government and private professionals.[6] Such a strategy is widely deemed "appropriate" for teenagers,[7] but it has been so little utilized that research on its implementation and effectiveness is only beginning to emerge.[8]

And, indeed, it may never emerge. For in a tragic misapplication of the Establishment Clause, the District Court in this case has declared invalid one of the central provisions of the Act—that its programs encompass, wherever "appropriate in the provision of services," *all* those segments of the community that may shape the decision to initiate sexual intercourse, including the family, "voluntary associations," and "religious and charitable organizations." 42 U.S.C. § 300z-5(a)(21). In a leaden, unnuanced reading of the Establishment Clause "test" first announced in *Lemon* v. *Kurtzman*, 403 U.S. 602 (1971), the lower court felt constrained to find that inclusion of "religious organizations" among potential grantees and participants under the Act caused it to have "the primary effect of advancing religion" (U.S. J.S. App. 21a, 38a) and to "[foster] excessive entanglement between government and religion." (*Id.* at 42a.)

Amicus pretends to bring to this case no special insight into the complex jurisprudence of the religion clauses, nor does *amicus* have special understanding of the general application of the Act.[9] What Covenant House and programs

[6] *Id.*

[7] I *Risking the Future*, *supra* note 2, at 269.

[8] *See* Hofferth, *The Effects of Programs and Policies on Adolescent Pregnancy and Childbearing*, in II *Risking the Future*, *supra* note 2, at 207, 208-211.

[9] Thus *amicus* takes no position regarding the asserted misuse of government funds explicitly to promote sectarian doctrine, U.S.

(footnote continued on following page)

like it *can* understand, however, is that the aims of the Act are of the highest public importance, that its structure in no way promotes "religion", and that the Act threatens no salacious contact between Church and State. Even more crucially, however, the secular aims of the Act can be accomplished *only* by involving *all* persons and groups that affect a teenager's thinking about beginning sex, including "religious organizations"—a factor not considered by the lower court but strongly implied by the *Lemon* test. Finally, the District Court's definition of "religious organizations" is so stunningly overbroad that such programs as Covenant House—with only the most attenuated ties to a church, and not the slightest history of proselytizing the youth it serves—are threatened with loss of funding under the Act. (U.S. J.S. App. 35a.) It is a decision muddled in conception and pernicious in result.

I.

Encouraging Teenagers to Avoid Premarital Sex and Pregnancy Is a Secular, Governmental Responsibility of the Highest Order.

For the hundreds of thousands of unmarried adolescent girls who become pregnant each year, for the children they carry to term, and for the teenaged boys who face premature fatherhood, this is no academic dispute. The decision teenagers make to begin sex often threatens them with a desperate change in personal circumstances, as it threatens society with crushing long-term burdens. No judgment on the constitutionality of the Act can fairly be made without

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J.S. App. 32a-38a; nor is *amicus* in a position, except with regard to Covenant House's own programs under the Act, to dispute the District Court's conclusion that such misuse constitutes an unconstitutional *application* of the Act.

an understanding of the gravity of its central aims, and the real lives it seeks to benefit.

Between 1970 and 1984 birth rates for unmarried girls aged 15 to 19 climbed 34.8 percent,[10] despite clear indications of better contraceptive use by sexually active teenagers,[11] and, of course, extraordinary increases in abortion.[12] There is one, and only one, explanation for this jump, and for the parallel rise in premarital pregnancies among teenagers: a steep climb in the number of adolescents who are sexually active.[13] Thus an 18-year-old girl in 1982 was 54 percent more likely to have had premarital sexual intercourse than an 18-year-old girl in 1971,[14] provoking one scholar to announce that "there was indeed a sexual revolution in the late 1960s and 1970s."[15]

And it was a revolution with grim consequences. For teenage mothers it has meant significantly reduced educational attainment,[16] and "serious negative implications for

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[10] I *Risking the Future*, *supra* note 2, at 66. For white girls in that age group out-of-wedlock birth rates climbed a staggering 74.3 percent. *Id.*

[11] S. Hofferth, *Contraceptive Decision-Making among Adolescents*, in II *Risking the Future*, *supra* note 2, at 56, 66; Jones, *supra* note 4, at 50; M. Zelnik *et al.*, *Sex and Pregnancy in Adolescence* 126 (1981).

[12] From 1971 to 1982 the number of legal abortions obtained by girls aged 15 to 19 rose from 150,000 to 443,000, accounting for the end of 40 percent of all teenage pregnancies. I *Risking the Future*, *supra* note 2, at 58.

[13] Hofferth *et al.*, *Premarital Sexual Activity among U.S. Teenage Women Over the Past Three Decades*, 19 Family Planning Perspectives 46 (1987).

[14] *Id.* at 48 (57.8% of such girls sexually experienced in 1982 as against 36.9% in 1971).

[15] *Id.* at 53.

[16] *See* Mott & Marsiglio, *Early Childbearing and Completion of High School*, 17 Family Planning Perspectives 234 (1985); I *Risking the Future*, *supra* note 2, at 124-28.

long-term marital stability and . . . economic well-being," [17] including drastically lower employment prospects.[18] For their children it has meant sharing that instability and poverty, along with an elevated risk of low birth weight and postneonatal death.[19] For American taxpayers it has meant shouldering a burden of over $16 billion in public assistance paid each year to women who first gave birth as teenagers,[20] and the responsibility to provide intensive services tailored to the need of adolescent mothers for adult guidance.[21]

Single teenaged parents and their children are the chief victims of the adolescent "sexual revolution," but hardly the only ones. Between 1963 and 1979 the rate of reported gonorrhea among 15- to 19-year-old females rose 553 percent; at its current rate that sexually transmitted disease alone will cause U.S. adolescents 5000 cases of chronic pelvic pain, 1600 cases of infertility, and 950 ectopic pregnancies each year.[22] Chlymydia, pelvic inflammatory dis-

[17] I *Risking the Future*, *supra* note 2, at 129.

[18] *Id.* at 130-32. Differences in employment rates between young mothers and their peers without children, as much as 40 percent over 5 years, do diminish somewhat in the long run. *Id.*

[19] D. Strobino, *The Health and Medical Consequences of Adolescent Sexuality and Pregnancy: A Review of the Literature*, II *Risking the Future*, *supra* note 2, at 93, 116-122.

[20] Burt, *Estimating the Public Costs of Teenage Childbearing*, 18 Family Planning Perspectives 221, 223 (1986). *See* S. Hofferth, *Social and Economic Consequences of Teenage Childbearing*, in II *Risking the Future*, *supra* note 2, at 123, 140-41.

[21] *See, e.g.*, Sisto, *Therapeutic Foster Homes for Teenage Mothers and Their Babies*, 64 Child Welfare 157 (1985). Covenant House, in its New York program alone, provides crisis services and shelter to over 800 adolescent mothers who bring with them over 1000 infants and toddlers; the vast majority have nowhere else to go and are unable to subsist on public assistance.

[22] T. Bell & K. Hein, *Adolescents and Sexually Transmitted Diseases*, in *Sexually Transmitted Diseases* 73, 77, 82 (Holmes ed. 1984) (hereinafter "Sexually Transmitted Diseases").

ease, and syphilis are serious dangers for sexually active teenagers, and, indeed, early coitus has been found to produce an increased risk of cervical cancer.[23] Now Acquired Immune Deficiency Syndrome presents a health threat to such youths of an entirely different magnitude.[24] Somewhat less melodramatic, but no less telling, are the emotional and psychological consequences of uncommitted adolescent sex. Thus a substantial body of psychiatric opinion now holds that, for adolescents:

> the new sexual freedom has by no means led to greater pleasure, freedom, and openness, more meaningful relationships between the sexes or exhilarating relief from stifling inhibitions. Clinical experience has shown that the new permissiveness has often led to empty relationships, feelings of self-contempt and worthlessness . . . .[25]

It may result, as well, in "pervasive feelings of guilt" and "severe emotional conflicts".[26]

Crucial to this case is the recognition that only through reduction in current levels of adolescent premarital sexual intercourse can these frightening problems be successfully addressed. It is worth particular note that the alternative strategy of encouraging use of contraception and abortion by teenagers is of remarkably limited value. Thus adolescent contraceptive failure rates are extremely high for

[23] *Id.* at 79-81 (and studies cited therein).

[24] *See generally AIDS and Teenagers: Emerging Issues, Hrg. Before the House Select Comm. on Children, Youth, and Families, 100th Cong., 1st Sess.* (1987).

[25] A. Nicholi, *The Adolescent*, in *The Harvard Guide to Modern Psychiatry* 519, 530 (1980).

[26] *Id.*

all forms of contraception,[27] and in practice their use of contraceptives "approaches an almost random pattern":[28] it is at present problematic at best to contend that higher levels of family-planning services will alone reduce adolescent pregnancy rates.[29] Worse, the contraceptive pill, which apart from abstinence provides the most effective birth control for teenagers, has been found to be associated with increased risk for contracting certain sexually transmitted diseases[30] and possibly an increased risk of breast and cervical cancer.[31] Abortion, too, has health risks,[32] quite apart from the difficult emotional and moral issues it may raise for vulnerable adolescents.

Helping teenagers to avoid or at least delay premarital sexual intercourse, then, is good public policy, and good

[27] Grady *et al.*, *Contraceptive Failure in the United States: Estimates from the 1982 National Survey of Family Growth*, 18 Family Planning Perspectives 200 (1986) (11.0% one-year pregnancy rate for women under 18 using the pill to prevent pregnancy; 10.5% for IUD; 18.4% for condom, *id.* at 207).

[28] F. Bolton, *The Pregnant Adolescent: Problems of Premature Parenthood* 35 (1980).

[29] Thus the data from one recent study showed a positive correlation between the percentage of teenagers served at family-planning clinics and adolescent pregnancy rates. Singh, *Adolescent Pregnancy in the United States: An Interstate Analysis*, 18 Family Planning Perspectives 210, 217 (1986).

[30] S. Aral & K. Holmes, *Epidemiology of Sexually Transmitted Diseases*, in *Sexually Transmitted Diseases*, *supra* note 22, at 126, 137-38.

[31] *See, e.g.*, McPherson & Drife, *The Pill and Breast Cancer: Why the Uncertainty?*, 293 Br.Med.J. 709 (1986); *Oral Contraceptives and Breast Cancer*, The Lancet 665 (9/20/86); *Another Look at the Pill and Breast Cancer*, The Lancet 985 (11/2/85); Olsson *et al.*, *Oral Contraceptive Use and Breast Cancer in Young Women in Sweden*, The Lancet 748 (3/30/85).

[32] *See* Strobino, *supra* note 19, at 105-111. Some evidence suggests that abortion before first-term pregnancy may increase the risk of breast cancer. *See, e.g.*, Vessey *et al.*, *Oral Contraceptive Use and Abortion Before First Term Pregnancy in Relation to Breast Cancer Risk*, 45 Br.J.Cancer 327 (1982).

public policy of a particularly compelling kind. At stake are the health of millions of adolescents and small children, as well as the ability of government to avoid excruciating short- and long-term demands on its resources. What the challenged Act attempts is only a tentative first step in what must ultimately be a principal direction of assistance to adolescents.

II.

The Challenged Act Threatens No Conflict With the Establishment Clause.

The court below was therefore surely right to find the intentions of the Act "well-founded and benign", U.S. J.S. App. 44a; what it failed, in part, to understand was the importance those intentions have for the second and third prongs of the *Lemon* test. By not attending to the specifically secular thrust of the Act's provisions, and by not considering the lack of credible policy alternatives available to Congress, the District Court produced an opinion as potentially damaging to Establishment Clause jurisprudence as its order is harmful to adolescents in need of preventive services.

As recently restated by the Court, the latter two tests for Establishment Clause violations are familiar:

> . . . second, [the statute's] principal or primary effect must be one that neither advances nor inhibits religion . . .; finally, the statute must not foster an excessive entanglement with religion.

Grand Rapids School District v. *Ball*, 473 U.S. 373, 382 (1985) (quoting *Lemon* v. *Kurtzman*, 403 U.S. 602, 612-613 (1971) (citations omitted). Thoughtful attention to balanced notions of what "religion" means in this context, to

the very terms of the Act, and to the use of the adjectives "principal," "primary," and "excessive" in the *Lemon* formulation, can only lead to conclusions sharply divergent from those adopted below.

A. *The Act Has No Relevance to Promotion of "Religious Doctrine".*

At the essence of the District Court's analysis of the Act is its view that it "contemplates subsidizing a fundamental religious mission" of organizations "affiliated with" certain religions. U.S. J.S. App. 30a. That "mission", apparently, is to instruct the "fundamental tenet of [such] religions that premarital sex and abortion are wrong, even sinful." *Id.* Providing aid to "religious organizations" for "the purpose of encouraging abstinence and adoption" has, q.e.d., the "primary effect" of advancing religion. *Id.* at 30a-32a.

Yet this is, at best, a serious misrepresentation of the "religious doctrines" supposedly at stake, and, at worst, a grotesque parody of what "religion" means in relation to secular values. The lower court identifies *no* religion that teaches its adherents specifically what the Act commands its grantees to proclaim: that premature sexual intercourse by teenagers "often results in severe adverse health, social, and economic consequences", 42 U.S.C. § 300z(5), and that adoption of children born out of wedlock can be a "positive option . . . as a means of providing permanent families for such children." 42 U.S.C. § 300z (6)(A). And even a cursory recollection of what "religious doctrine" actually relates to in this area suggests the impossibility of ever identifying such a "church."

For no "religion", properly understood, ever bases its exhortations primarily on "health" or "social" or "economic" consequences of specific actions; nor, indeed, do its claims

relate primarily to *actions* at all. It is *"belief"* that is at the heart of "religion" within the meaning of the First Amendment—that is, ideas based on some (unprovable) "faith". *See Edwards* v. *Aguillard,* —— U.S. ——, 96 L.Ed.2d 510, 525-526 (1987) (distinguishing the teaching of theory based on "religious belief" from teaching of "scientific critiques"). Government's efforts to cause citizens to *act* differently—as opposed to believing, speaking or writing differently—do not normally present substantial First Amendment concerns. *See United States* v. *O'Brien,* 391 U.S. 367, 379-380 (1968). The challenged Act is no more, and no less, than such an effort: to get teenagers to alter their sexual *behavior* whether or not they believe it to be "wrong" or "sinful". Congress has sought merely to convince them that certain behavior is stupid.

It is precisely the *super*natural claim of religion on thought that makes the Establishment Clause necessary to prevent political and social disarray—for how can civilized argument be conducted in a religiously pluralistic society if a governing group claims some special contact or warrant from a deity? *See Board of Education* v. *Allen,* 392 U.S. 236, 251-252 (1968) (Black, J., dissenting). Conversely, education and discussion regarding empirical facts about "health, social, and economic consequences" of certain activities is exactly what good government can sponsor without provoking sectarian and political discord. *See Walz* v. *Tax Comm'n,* 397 U.S. 664, 695-697 (1970) (Harlan, J., concurring). Religious people, and the religious organizations they establish, are just as capable of discussing such facts as any others, and in doing so cannot be seen as promoting "religious doctrine," even where fact does not contradict doctrine.

It is, moreover, a travesty to portray hostility toward "premarital sex" as a "fundamental tenet" of the religions

the Act is supposed to "advance".[33] At least some of the religions in question would view with horror a sexual agenda limited to the simple prevention of intercourse; thus the Roman Catholic Church, so prominent in the lower court's analysis, preaches with equal fervor against many sexual behaviors that have *no* clearly negative empirical consequences and, indeed, against many sexual *feelings*.[34] And conversely, the great Christian writers have often railed at imagining that merit has been obtained simply through containing sexual passions.[35]

What is this "religion" that the Act is "advancing", and how is the promotion occurring? Just as "religions" and cultures have vastly differing views of appropriate adolescent sexual conduct,[36] so it is impossible to pigeonhole the

[33] The church most frequently mentioned by the lower court, and whose doctrines were presumably most substantially "advanced" by the Act, was the Roman Catholic Church. *See* U.S. J.S. App. 33a-38a.

[34] *See, e.g.*, R. Lawler *et al.*, *Catholic Sexual Ethics* 187 (1985) (masturbation "seriously wrong"); *id.* at 195 ("incomplete acts of lust" such as "fondling or kissing . . . aimed at stirring up sexual arousal" are "gravely sinful"); *id.* at 173 ("preoccupation with sexual pleasure" sinful even for married couple).

[35] Thus St. Augustine has it: "And if there be some . . . citizens who seem to restrain and, as it were, temper those passions, they are . . . elated with ungodly pride . . . . And if some, with a vanity monstrous in proportion to its rarity, have become enamoured of themselves because they can be stimulated and excited by no emotion, moved or bent by no affection, such persons rather lose all humanity than obtain true tranquility. For a thing is not necessarily right because it is inflexible, nor healthy because it is insensible." *City of God* 456 (M. Dods trans. 1950) (bk. 14, ch. 9). C. S. Lewis was pithier: ". . . a cold, self-righteous prig who goes regularly to church may be far nearer to hell than a prostitute. But, of course, it is better to be neither." *Mere Christianity* 95 (1960).

[36] *See* S. Frayser, *Varieties of Sexual Experience* 201-206 (1985) (37% of 51 societies studied around the world do not censure premarital sex, *id.* at 204); M. Mead, *Coming of Age in Samoa* 161 (1961) ("passive acceptance" of "sexual irregularities" among Samoan adolescents by Christian missionaries).

Act's clearly secular programme into the tenets of any sect. And because it is concerned solely with *behavior,* and behavior strictly relevant to the grave secular concerns surrounding teenage pregnancy and sexually transmitted disease, the Act has no relevance, certainly no "principal or primary" relevance, to "religious *doctrine*."

B. *The Structure and Terms of the Act Adequately Guard Against "Entanglement" of Government and Religion.*

Upon finding that "counselling" related to sexual activity necessarily tended to "advance" religion, it seemed an easy step for the lower court to conclude that *Lemon's* "entanglement" test had also been violated by the Act. U.S. J.S. App. 39a-43a. In the court's view, the prevention of indoctrination by religious organizations would "require extensive and continuous monitoring and direct oversight of every counselling session." *Id.* at 41a.

Discussing the hard facts of adolescent sex and pregnancy is not, as discussed above, plausibly related to the quite different task of implanting belief in supernatural persons and forces. Yet the District Court does point to instances where it believes "religious organizations" exploited the opportunity provided by the Act to promote sectarian values. *Id.* at 32a-38a. Does that mean that government monitoring of the type described is necessary simply to guard against abuse?

The Act itself provides a specific answer to that question. For it requires that grantees spend between one and five percent of their awards to obtain comprehensive "evaluations of the services supported", such evaluations to be conducted by a "college or university located in the grantee's State". 42 U.S.C. § 300z-5(b). Thus the Act on its face provides a reliable, non-entangling means to assure that the explicit Congressional directives against

proselytizing are observed. It is "*governmental* supervision" of the line between secular and sectarian that raises "entanglement" concerns in educational-aid settings, *Aguilar* v. *Felton*, 473 U.S. 402, 418-419 (Powell, J., concurring) (emphasis added); here the government has found a means of verifying both the effectiveness of funded programs and their conformity with statutory requirements *without* any "ongoing" or even transient "presence of state personnel" for monitoring purposes. *See id.* at 413 (opinion of the Court).

In other concrete ways, too, the Act's programs seem far less subject to public mispereception than those previously struck down by this Court. Most importantly, participation of adolescents is strictly voluntary—*i.e.*, not provided in the context of mandatory school attendance. Likewise, participation is confidential, 42 U.S.C. § 300z-5 (a)(11), with no danger that the youths involved will be religiously labelled through the programs. Finally, no small children are involved, only adolescents, with "priority" given to serving a population of adolescents (those in areas with a "high incidence of adolescent pregnancy") likely to have had more real-world experience of the issues to be discussed. 42 U.S.C. § 300z-4(a)(2). They are, in sum, a group who can easily walk away from a program that preaches religion, and indeed are likely to do so. The one-on-one and confidential nature of the "counselling" so feared by the District Court, moreover, makes it actually much less likely than classroom teaching to provoke controversy among parents or the general public.

On a more general basis, though, the lower court's "entanglement" analysis seems especially misguided, even perverse. For it closes its eyes to the fact that religiously affiliated organizations are not prohibited from receiving, and do receive, federal funding to provide extensive services, including counselling, to adolescents in such govern-

ment-funded programs as foster care, *see* 42 U S.C. § 608, crisis services for runaway and homeless youth, 42 U.S.C. §§ 5701-5751, and juvenile delinquency prevention, *see* 42 U.S.C. § 5634. *See, e.g., Wilder* v. *Bernstein*, 645 F. Supp. 1292 (S.D.N.Y. 1986) (foster care). Is it religious proselytizing or "entanglement" to counsel a youth that premarital sex may have serious health, social, and economic consequences, but *not* constitutionally offensive for a religiously affiliated organization to urge a runaway to return home (Exodus 20:12) or to avoid violence and theft (Exodus 20:13,15)?

The District Court was not prepared to wrestle with this question because, at the base of its analysis is an unrecognized, and unjustified, assumption that sexual conduct is somehow *more* central to "religion" than other aspects of human life. It therefore proceeded to find "entanglement" in the context of sexuality counselling where it would never have done so in other areas where religious doctrine and sound public policy happen to coincide. That finding is insupportable.

C. *Because the Act's Inclusion of "Religious Organizations" Is Necessary to Accomplishment of Its Wholly Secular Purposes, and Because Those Purposes Include the Compelling Need to Protect Children From Harm, It Must Be Sustained as a Reasonable Exercise of Government Power Under the First Amendment.*

The decision of Congress to include charities with religious affiliations in the Act's strategy was a deliberate, and necessary one. Such organizations are crucial for reaching minority populations, S. Rep. No. 496, 98th Cong., 2d Sess. 10 (1984),[37] and of course it is among minority

[37] It is worth noting in this regard that recent research suggests enrollment of nonwhite teenagers in traditional, almost exclusively

(footnote continued on following page)

teenagers that premarital pregnancy and birth are most extensive.[38] Adolescent sexual activity and pregnancy cannot be explained simply with crude socioeconomic measures,[39] and they cannot be effectively addressed without addressing "culture", which "fundamentally affects sexuality and fertility", and of which religious organizations are a prominent part.[40] For all teenagers, not just those in minority groups, the decision to initiate sex or to bear a child will be made in *whole* context of their environment;[41] excluding one of the most significant aspects of that environment in sexuality counselling would be self-defeating and harmful. See S. Rep. No. 496, *supra*, at 10.

Does the First Amendment require such exclusion, in an area where children and teenagers suffer severe health, social, and economic harms, and where Congress found the participation of religiously affiliated charities crucial

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non-sectarian family planning clinics has no positive statistical impact on their fertility rates. Anderson & Cope, *The Impact of Family Planning Program Activity on Fertility*, 19 Family Planning Perspectives 152, 155 (1987). For white teenaged women, by contrast, such enrollment has a strong negative statistical impact on fertility after appropriate controls. *Id.*

[38] Thus black teenaged girls bear out-of-wedlock children at rates currently four times higher than their white peers, I *Risking the Future*, *supra*, at 66, with rates for hispanic teenagers between the two extremes. *Id.* at 65.

[39] *Id.* at 97-99.

[40] *Id.* at 93.

[41] Thus "religiousness" (*i.e.*, intensity of adherence to *any* "religion," regardless of its dogmatic content) is an "important factor distinguishing early from later initiators of sexual activity", *id.* at 99, but so, too, are family characteristics, *id.* at 102-104, "community standards and expectations," *id.* at 99, and "academic achievement" and "educational goals". *Id.* at 100. "Religious *affiliation*", by contrast, shows little relationship to such activity, *id.* at 99-100 (and studies cited therein), indicating the fallacy of the lower court's crude effort to connect sexual *behavior* with creed.

to its attempt to address those harms? Some forty years ago this Court formulated the principles for answering that question:

> A democratic society rests, for its continuance, upon the healthy, well-rounded growth of young people into full maturity as citizens, with all that implies. It may secure this against impeding restraints and dangers within a broad range of selection.

Prince v. *Massachusetts*, 321 U.S. 158, 168 (1949). From the decision in *Prince* that religious liberty under the First Amendment could be limited where necessary to protect children from serious harm, to the more recent formulation of that view of the First Amendment in *New York* v. *Ferber*, 458 U.S. 747, 758-764 (1982), and *id.* at 776 (Brennan, J., concurring), it has been clear that First Amendment "tests" must never be so rigid as easily to contemplate the avoidable infliction of serious harm on minors. *See also, Ginsburg* v. *New York*, 390 U.S. 629 (1968). That it is the Establishment Clause which is involved in this case is of no moment, for "it may be doubted that any of the great liberties insured by the First Amendment can be given higher place than others. All have preferred position in our basic scheme. . . . All are interwoven there together." *Prince* v. *Massachusetts*, *supra*, 321 U.S. at 164 (citations omitted).[42]

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[42] *Aguilar* v. *Felton*, 473 U.S. 402 (1985), and *Grand Rapids School District* v. *Ball*, 473 U.S. 373 (1985), are not to the contrary. The remedial education programs reviewed in those cases were nowhere asserted to be crucial to avoiding harms to children of the magnitude of those associated with child labor, *Prince* v. *Massachusetts*, *supra*, child pornography, *Ferber*, *supra*, or adolescent pregnancy. Further, comparable programs could be provided in public schools or public facilities, where Congress here was *compelled* to include religious organizations in the scope of the Act to have any hope of credibly addressing the teen pregnancy problem at all. *See* text to notes 38-41, *supra*.

Accommodating the compelling interests at stake under the Act with the tests of *Lemon* v. *Kurtzman*, fortunately, is not impossible or even difficult. For it is only "principal or primary" effects tending to advance or inhibit religion, and only "excessive" entanglement that those tests proscribe. 403 U.S. at 612-613. Any substantial reduction in teenage sexual activity or pregnancy resulting from sexual education and counselling surely would be an effect of the Act utterly dwarfing any of the theoretical doctrinal effects conjured up by Appellees and the lower court.[43] And government action to address searing harms to children and youth, through facially secular means, is unlikely ever to involve *excessive* "entanglement" simply in permitting participation by religious organizations. What the lower court's opinion failed to appreciate fully is that *Lemon's* tests themselves contemplate balancing of competing interests and degrees of possible harm, and "[depend] on all the circumstances of a particular relationship." *Lemon* v. *Kurtzman*, *supra*, 403 U.S. at 614. The Act—and every teenager it attempts to protect—deserves better than the "legalistic minuet" to which Appellees invite the Court. *Id.*

[43] In renewing the Act in 1984, Congress took note of the fact that since its passage "the trend of [teen pregnancy rates] is improving for the first time since 1973." S. Rep. No. 496, 98th Cong., 2d Sess. 6 (1984). At the very least the Act's first few years suggested that its projects "will provide valuable information to help identify successful innovative approaches for use by State and local service providers." *Id.*

III.

The District Court's Definition of Proscribed "Religious Organizations" Is Seriously Confused and Overbroad.

Religiously affiliated charities deserve better, too, than the undifferentiated scorn they received from the District Court. Its opinion appears to threaten a prohibition on *any* participation, funded or unfunded, in "carrying out the programs and purposes of the Act" by all organizations with explicit ties to "any particular religious faith" or to any "religious doctrine". U.S. J.S. App. 35a, 47a-48a. As the Secretary and United Families of America ("U.F.A.") have eloquently demonstrated in their respective jurisdictional statements, this amounts to an evisceration of this Court's patient efforts to distinguish "pervasively sectarian" organizations from those with only limited sectarian ties. *See* U.F.A. J.S. 18-19 (Case No. 87-775); U.S. J.S. 14-16.

For "religious" charities and their clients, of course, far more is at stake than purity of legal doctrine. At Covenant House's own programs under the Act, over 200 teenage mothers, along with three dozen teenage fathers, are at any one time receiving substantial, desperately needed help. *See* Jt. App. 639-641 (Affidavit of Rev. Bruce Ritter). Independent outside evaluation of those programs has revealed that while serving "a particularly difficult population", they have been "successful in reducing the rate of pregnancies among the teen mothers".[44] Further, they increased the knowledge of clients regarding health, nutri-

[44] E. Shinn, Covenant House Adolescent Family Life Project: Interim Year Evaluation 9, 20 (1987) (filed with Office of Adolescent Pregnancy Programs, U.S. Dep't of Health and Human Services).

tion, sexuality, parenting, education, and job training—"establishing a good foundation on which [they] could build." [45]

The president of Covenant House is a Catholic priest, but proselytizing religion is never allowed in its programs, and religious dogma or doctrine plays no role in the counselling it offers adolescents in its programs. Jt. App. 93-94 (Ritter Affidavit). Its board of directors is non-sectarian and subject to no control by any outside church or religious body. The homeless and runaway children it serves come from every faith. Under no reasonable criteria, therefore, could Covenant House be judged "pervasively sectarian"; yet it is proud of its ties to the Roman Catholic Church, and grateful for the diverse religious and moral faiths of its employees and volunteers.

Covenant House may not be strictly typical of religiously affiliated grantees under the Act, but clearly the problems posed by the District Court's extraordinary order will be just as grave for children and adolescents in all such programs. If that order is enforced, it will cause irreversible harm to those young clients and to all those program employees who have in good faith tried to help them. It will herald, too, the beginning of a war on the involvement of religiously affiliated charities in any public efforts to aid the weak and disadvantaged.

As this Court has long maintained, the Establishment Clause "requires the state to be neutral in its relations with groups of believers and non-believers; it does not require the state to be their adversary." *Everson* v. *Board of Education*, 330 U.S. 1 (1947). The District Court on remand should at least be required to limit its holding to abuses actually found, and to exempt any but the most "pervasively sectarian" organizations from its order.

[45] *Id.* at 9-10.

CONCLUSION

> I always remember, though, the first time I ever did it, the next morning coming home, and I had my best friend with me. And I just started crying to her saying, "Oh my God. I know I am pregnant." I mean, the next day. "What am I going to do, how can I have done that? Why did I do that? How could I have been so stupid? I know I'm pregnant." [I] bawled my eyes out.
>
> Indianapolis Teenager[46]

Crying out "Oh my God" can be as much an expression of pain, or despair, as it is of belief. It can be a response to the crushing burden of adolescent parenthood, to the birth of a premature, underweight child, or to the discovery of sexually transmitted disease. It can be the anguished reaction of a legislator challenged to "solve" the problems created by teenage sex and pregnancy. It can be the unspoken prayer of a counsellor trying to tell a sullen teenager the facts of adult life.

Thomas Jefferson's, and the *Everson* Court's, "wall of separation" stands "between Church and State". 330 U.S. at 16. It was not meant to stand between legislators and children in peril of ruined health and shattered futures. This Act—and the efforts of religious and nonreligious organizations it sanctions—may not end the national tragedy, or dry all the tears, of children who grow old too soon. But neither does it violate the First Amendment.

[46] Kisker, *supra* note 1, at 85.

The judgment of the United States District Court for the District of Columbia should be reversed.

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